

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Case No. BKY 04-33304**

**Kevin John Tix**

**Chapter 7 Case**

**Debtor(s).**

---

**AFFIDAVIT OF KEVIN J. TIX**

---

Kevin J. Tix, being first duly sworn, upon oath, deposes and states as follows:

1. I am the debtor in the above-captioned bankruptcy case, and I make this Affidavit in opposition to the motion of the United States Trustee to dismiss my Chapter 7 bankruptcy case under 11 U.S. C. §707 (b).

2. An issue has been made with respect to my net monthly take home pay and income, and whether legally I have sufficient income after the payment of my monthly living expenses to pay my unsecured consumer debts. I do not.

3. I am a cell leader for Amesbury Group, 105 Washington Street Southwest, Cannon Falls, Minnesota 55009. My current hourly rate of pay is \$21.48, and I am guaranteed a 40-hour workweek. When I was transferred to the daytime shift on January 1, 2004, I received a reduction in pay of \$1.50 an hour as compared to my pay rate working the night shift and being a team leader. I am no longer a team leader on my shift. However, if the team leader is gone during my shift, I serve as team leader during the shift and am paid accordingly. Because I work days, I no longer receive a shift differential in pay. In the past, we have also received challenge bonuses, which are not guaranteed or expected. I have not received a challenge bonus for a couple of months. Additionally, there used to be substantial overtime available, which is no

longer available or available on a very limited basis. Attached hereto is a copy of my paystub for the period ending May 16, 2004, showing 9.50 hours of overtime. My paystub attached to the motion of the United States Trustee for the period ending July 4, 2004, showed 1.00 hour of overtime for that pay period. A copy of my paystub for the period ending August 22, 2004 is attached hereto, showing less than an hour of overtime for that pay period.

4. My income was greater during the years 2002 and 2003 because I was working nights as a team leader, which resulted in a greater hourly rate of pay. Also, during 2002 and 2003, substantial overtime was regularly available. The reduction in my hourly rate of pay and the general nonavailability of overtime have caused a significant reduction in my income.

5. The United States Trustee has made issue out of my 401(k) contributions and the repayment of my 401(k) loan, which are both reflected on my paystubs and deducted from my income when I am paid, and has excluded these amounts in calculating my disposable income. However, if my 401(k) contributions are excluded, the taxes which I must pay on this increased income must be accounted for. If my 401(k) contributions and 401(k) loan repayment are excluded from the calculation of my income, my net take home pay would be \$2503.55 a month, calculated as follows:

Gross Monthly Income	\$3723.20	
Pretax Medical Insurance	<u>( 101.18)</u>	
Adjusted Gross Monthly Income		\$3622.02
Deductions		
Federal Tax	\$ 590.00	
State Tax	218.00	
Social Security	224.57	
Medicare	52.52	
Life Insurance	21.00	
Tools	<u>12.38</u>	
		<u>(1118.47)</u>
Net Monthly Take Home Pay/Income:		\$2503.55

6. I am concerned that if the required repayment of my 401(k) loan is not allowed as a deduction from my take home pay and is no longer taken directly out of my paycheck, I will have tax consequences which I cannot afford as a result of this change. I would then have to pay taxes on over \$500.00 in additional income per month.

7. I took out a loan against my 401(k) account after I was divorced. I needed the proceeds of the loan to pay bills and debts which were my responsibility pursuant to the divorce decree, and to purchase furniture, pay rent, and establish a new residence after the divorce was finalized. I had no other resources for this purpose.

8. My loan with Vermillion State Bank is secured by a 1999 Dodge Ram pick-up truck and a 1996 Suzuki motorcycle. To retain the truck, I need to make the entire monthly loan payment of \$680.00. This is a necessary expenditure. Previously, these motor vehicles were subject to a loan from Dodge with an interest rate of 18 percent, due to my bad credit. I was able to decrease the interest of 10 percent by refinancing the loan through Vermillion State Bank. However, the loan was required to be for a shorter term, which increased my monthly payments.

9. The value of my truck is approximately 4 times the value of my motorcycle. Consequently, to reduce my automobile expense by \$280.00 from the current loan payment to account for the motorcycle is excessive. Furthermore, it should be noted that the cases cited by the United States Trustee in support of a reasonable motor vehicle payment are 7 and 8 years old. The cost of motor vehicles has increased substantially during this time, and these cases are not reflective of current automobile costs. I do not live an extravagant lifestyle, and my monthly expenses, including my Vermillion State Bank loan payment, are quite modest.

10. I currently live with my girlfriend in her home. She does not require that I pay rent, with the agreement and understanding that I will pay certain household expenses and

contribute to other general household expenses. Quite often, I give her cash for these expenses. Because I am not required to pay rent, it is only fair that I contribute in this manner.

11. My telephone bill, as reflected in my Schedule J reflecting my monthly expenses, has been understated. My telephone bill for the last 4 months has been as follows: June - \$127.09, July - \$69.33, August - \$291.01, and September - \$135.00. Furthermore, my payments for electricity and heating fuel have been \$170.30 a month over this same period (Center Point - \$86.30 and Xcel Energy - \$84.00). I also spent \$143.19 during August for brakes for my truck, and \$103.50 for tabs for my truck during September.

12. I am currently 47 years of age, having been born on October 21, 1956. My only retirement interest is my 401(k) account with my employer, the Amesbury Group.

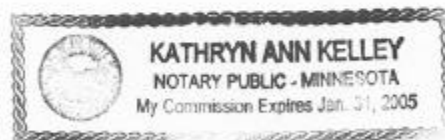
13. I filed my Chapter 7 bankruptcy case in good faith and had no intention of abusing the bankruptcy system. I believed then and I believe now that I qualify for a Chapter 7 bankruptcy.

Further you affiant sayeth naught.

  
Kevin John Tix

Subscribed and sworn to before me  
this 9th day of September, 2004.

  
Notary Public



CO. FILE DEPT. CLOCK NUMBER 069  
 NJ4 020470 009511 20470 0000067768 1

AMESBURY GROUP PLASTIC PROFILES INC.  
 PLASTIC PROFILES DIVISION  
 105 WASHINGTON ST. SW.  
 CANNON FALLS, MN 55009

Taxable Marital Status: Single  
 Exemptions/Allowances:  
 Federal: 0  
 State: 0

## Earnings Statement



Period Ending: 05/16/2004  
 Pay Date: 05/21/2004

KEVIN J TIX  
 1307 W 16TH ST  
 HASTINGS, MN 55033

Earnings	rate	hours	this period	year to date
Regular	21.4800	16.00	343.68	14,556.38
Overtime	32.2200	9.50	306.09	741.54
Vacation	21.4800	24.00	515.52	1,761.36
Bonus				250.00
Holiday				692.88
Personal				171.84
Shift				13.41
Shift				18.00
Tlead				18.84
<b>Gross Pay</b>			<b>\$1,165.29</b>	18,224.25

Your federal taxable wages this period are  
 \$1,072.02

### Other Benefits and Information

	this period	total to date
Ermatch	34.96	546.77
401K		1,093.47
Personal		24.00
Vacation		38.00

Deductions	Statutory	
	Federal Income Tax	-194.35
	Social Security Tax	-70.80
	Medicare Tax	-16.56
	MN State Income Tax	-66.85
	<b>Other</b>	
	Gtlife	-8.97
	Pretax Ins	-23.35*
	401K-M-50	-69.92*
	410Kln	-119.07
	Tools	
	<b>Net Pay</b>	<b>\$595.42</b>

\* Excluded from federal taxable wages

CO. FILE DEPT. CLOCK NUMBER 089  
 NJ4 020470 009511 20470 0000068656 1

AMESBURY GROUP PLASTIC PROFILES INC.  
 PLASTIC PROFILES DIVISION  
 105 WASHINGTON ST. SW.  
 CANNON FALLS, MN 55009

Taxable Marital Status: Single  
 Exemptions/Allowances:  
 Federal: 0  
 State: 0

## Earnings Statement



Period Ending: 08/22/2004  
 Pay Date: 08/27/2004

KEVIN J TIX  
 1307 W 16TH ST  
 HASTINGS, MN 55033

Earnings	rate	hours	this period	year to date
Regular	21.4800	40.00	859.20	25,001.03
Overtime	32.2200	.75	24.17	2,127.02
Bonus				450.00
D/T				10.74
Holiday				1,036.56
Personal				601.44
Shift				13.41
Shift				18.00
Tlead				62.52
Vacation				2,577.60
<b>Gross Pay</b>			<b>\$883.37</b>	<b>31,898.32</b>

Your federal taxable wages this period are \$807.1

### Other Benefits and Information

	this period	total to date
Ermatch	26.50	957.00
401K		1,913.90
Personal		4.00
Vacation		0.00

Deductions	Statutory	
	Federal Income Tax	-128.10
	Social Security Tax	-53.32
	Medicare Tax	-12.47
	MN State Income Tax	-48.17
	<b>Other</b>	
	Gtife	-8.97
	Pretax Ins	-23.35*
	401K-M-50	-53.00*
	410Kln	-119.07
	Tools	74.32
<b>Net Pay</b>		<b>\$436.92</b>

\* Excluded from federal taxable wages

efficiency

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In Re:**

**Case No. BKY 04-33304**

**Kevin John Tix**

**Chapter 7 Case**

**Debtor(s).**

---

**MEMORANDUM OF LAW**

---

**INTRODUCTION**

The United States Trustee has moved the Court to dismiss the Chapter 7 bankruptcy case of the Debtor under 11 U.S.C. §707(b), alleging that the debts of the Debtor are primarily consumer debts and that the granting of relief would be a substantial abuse of Chapter 7 of the Bankruptcy Code. Specifically, the United States Trustee claims that the Debtor's adjusted net monthly income is \$2685.44 and his adjusted monthly living expenses are \$2039.00, and that this monthly difference would enable the Debtor to find a Chapter 13 plan, constituting substantial abuse under Chapter 7. The primary difference resulting in the adjustment of the Debtor's net monthly income as compared to the income schedule of the Debtor is the exclusion of the Debtor's 401(k) loan repayment in the calculation. The Debtor contests the income and expense calculations of the United States Trustee and opposes and defends the motion.

**STATEMENT OF FACTS**

The facts which are pertinent to the dismissal motion of the United States Trustee and to the Debtor's defense of said motion are as set forth in the bankruptcy schedules and Affidavit of the Debtor, which are hereby incorporated herein by reference and made a part hereof.

## **LEGAL ARGUMENT**

Under 11 U.S.C. §707(b), "[t]here shall be a presumption in favor of granting the relief requested by the debtor." Consequently, the United States Trustee has the burden of rebutting the Bankruptcy Code's presumption in favor of granting the relief requested by a Chapter 7 debtor. In re DeRosear, 265 B.R.196 (Bkrcty. S.D. Iowa 2001). Because the presumption exists in favor of according relief to a debtor, the burden of proof is upon the United States Trustee to show that a Chapter 7 debtor's case should be dismissed for substantial abuse under 11 U.S.C. §707(b). In re Lee, 162 B.R.31 (Bkrcty. N.D. Ga. 1993). In this case, the United States Trustee has not rebutted the presumption in favor of granting the Debtor relief under Chapter 7 of the Bankruptcy Code, and the motion for dismissal must be denied.

The position of the United States Trustee in this case in support of its dismissal motion is premised upon the inclusion of the Debtor's 401(k) contributions and 401(k) loan repayment in the disposable income of the Debtor, and the resulting conclusion that the inclusion of these amounts permits the Debtor to fund a theoretical Chapter 13 plan, thereby constituting substantial abuse under §707(b). For purposes of the motion, the United States Trustee relies upon the definition of "disposable income" under 11 U.S.C. §1325(a) to mean income which is received by the debtor and which is not reasonably necessary to be expended for the maintenance or support of the debtor. However, the legal position of the United States Trustee is flawed under the facts of this case.

Contrary to the argument of the United States Trustee, there is no bright-line rule that any contribution by a bankruptcy debtor to a retirement plan, or any repayment by the debtor of a loan from the plan, is an unreasonable expense per se, and must be viewed as "disposable income" which the debtor should be paying into a debt adjustment plan; rather, any



determination as to whether this contribution/repayment is a reasonable expense must be made based on the facts of each individual case. In re Guild, 269 B.R. 470 (Bkrcty. D. Mass. 2001). It is within the discretion of the bankruptcy judge to make a decision, based on the facts of each individual case, whether pension contributions or retirement loan payments represent a "reasonably necessary expense" for that debtor, or whether they are part of the debtor's "disposable income" which the debtor must devote to payments under Chapter 13 plan. In Re Taylor, 243 F.3d 124 (2<sup>nd</sup> Cir. 2001). See e. g., In re Mills, 246 B.R. 395 (Bkrcty. S.D. Cal. 2000) (Chapter 7 debtor's voluntary retirement savings plan contribution was a "reasonably necessary expense" for purposes of determining his ability to pay his debts and whether his case should be dismissed for substantial abuse, where debtor was 56 years old, had no other retirement savings plan, the fund contribution was \$302.00 a month, and a review of the debtor's schedules indicate modest budgeting).

In the current case, the Debtor is 47 years of age and his only retirement interest is his 401(k) account through his employment with the Amesbury Group. Furthermore, his 401(k) contributions are reasonable and his monthly living expenses are modest. It should also be noted that the proceeds of the Debtor's 401(k) loan were used to pay bills, to pay debts from his divorce case, and to establish a new residence. As a result, the loan and the corresponding loan payment were necessary to facilitate the Debtor's modest lifestyle after his divorce. Consequently, the 401(k) contribution of the Debtor and his 401(k) loan repayment are "reasonably necessary expenses" and should not be included in his disposable income, and the granting of relief to the Debtor under Chapter 7 of the Bankruptcy Code would not be a substantial abuse of the provisions of Chapter 7 in this case.

Finally, it is important to note that irregardless of the Bankruptcy Court's treatment of the Debtor's 401(k) contributions and 401(k) loan repayments for purposes of the motion of the United States Trustee, a debtor's ability to repay debts is not, by itself, cause for discretionary dismissal of a Chapter 7 case. McDow v. Smith, 295 B.R. 69 (Bkrcty E.D. Va. 2003); In re Bridges, 135 B.R. 36 (Bkrcty. E.D. Ky. 1991). The Courts will also look at whether a debtor has acted in good faith:

"Dismissal based on lack of good faith... should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence."

In re Bridges, 135 B.R. at 37 (citing In re Zick, 931 F.2d 1124, 1129 (6<sup>th</sup> Cir. 1991)). As none of these factors are present in this case, the position of the United States Trustee that the Debtor has the ability to pay his debts is insufficient in itself to support its motion for dismissal, and the motion must be denied.

WHEREFORE, the Debtor submits this memorandum of law in opposition to and defense of the motion of the United States Trustee to dismiss this Chapter 7 bankruptcy case as a substantial abuse under the United States Bankruptcy Code.

Respectfully Submitted,

**TANNER, HAMILTON & ASSOCIATES, P.A.**

Dated: September 13, 2004.

  
MICHAEL G. HAMILTON - #17371X  
Attorney for Debtor  
755 Westview Drive  
P. O. Box 65  
Hastings, Minnesota 55033  
(651) 437-8037

UNSWORN CERTIFICATE OF SERVICE

I, Kate Kelley, declare under penalty of perjury that on September 13, 2004, I mailed copies of the attached Affidavit of Kevin J. Tix, and Memoarndum of Law by first class mail postage prepaid to each entity named below at the address stated:

Sarah J. Wencil, Esq.  
United States Trustee's Office  
1015 United States Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415

Executed on: September 13, 2004.

Signed: /s/ Kathryn A. Kelley  
Tanner, Hamilton & Associates, P.A.  
755 Westview Drive  
P.O. Box 65  
Hastings, MN 55033  
(651) 437-8037